

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

VISA U.S.A. INC.,
VISA INTERNATIONAL CORP.,
and MASTERCARD INTERNATIONAL,

Defendants.

98 Civ. 7076 (BSJ)(KNF)

**DEFENDANT VISA U.S.A., INC.'S
RESPONSES AND OBJECTIONS
TO PLAINTIFF'S SECOND SET
OF INTERROGATORIES AND
RELATED DOCUMENT
REQUESTS**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure and Local Rules 26.2, 26.3, 33.3 and 33.4, defendant Visa U.S.A. Inc. ("Visa U.S.A."), by and through its attorneys, hereby responds to plaintiff United States of America's Second Set of Interrogatories and Related Document Requests as set forth below:

GENERAL OBJECTIONS

1. Visa U.S.A. makes the following general objections to the interrogatories, which objections are applicable to each interrogatory and incorporated therein. Further, any response by Visa U.S.A. to a particular interrogatory is not intended as an admission of the existence of any fact, assertion or other matters expressed or implied in the call of the interrogatory.

2. To the extent that any interrogatory may be construed as calling for information that is subject to a claim of privilege, including, but not limited to, the attorney-client privilege, the work product doctrine, or any constitutional, statutory or regulatory proscription against disclosure, Visa U.S.A. hereby asserts that doctrine or privilege and objects to the interrogatory on that basis. The specific responses and objections set forth below are exclusive of any material so protected.

3. Visa U.S.A. objects to each interrogatory to the extent it seeks to impose obligations on Visa U.S.A. greater than those set forth in the Federal Rules of Civil Procedure or the Local Rules of this Court.

4. Visa U.S.A. objects to the interrogatories as overbroad, unduly burdensome and beyond the scope of permissible discovery under Local Rule 26.3(c)(5) and Federal Rule of Civil Procedure 33, to the extent they call for or may be construed as calling for information in the possession, custody or control of (a) Visa U.S.A.'s member banks, (b) Visa International, (c) any legal entity other than Visa U.S.A. (such as foreign Visa entities or ventures in which Visa U.S.A. is merely a joint venture partner, or participant), (d) any former director, officer, employee, agent, attorney, consultant or other person acting on Visa U.S.A.'s behalf who is no longer so acting, or (e) current outside agents, attorneys, consultants or other persons acting on Visa U.S.A.'s behalf. Subject to any objections or limitations contained herein, Visa U.S.A. will respond to the interrogatories based on a reasonable search of information in its own possession or that of its current directors, officers, and employees.

5. Visa U.S.A.'s objections and responses to the interrogatories and document requests are based upon information currently known or available to Visa U.S.A. through a reasonable search and diligent inquiry. Visa U.S.A. reserves its right to amend or supplement its objections and responses herein based on additional information that becomes known and/or available to it.

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

INSTRUCTION NO. 1

The information requested is that information within the possession, control, or custody of your company. These interrogatories are continuing in nature to the fullest extent provided under the Federal Rules of Civil Procedure. To the extent you ascertain additional responsive information subsequent to your response to these interrogatories, set forth all information promptly in supplemental answers.

OBJECTION TO INSTRUCTION NO. 1

Visa U.S.A. objects to Instruction No. 1 to the extent that it seeks to impose an undue burden on Visa U.S.A. above and beyond its obligations under Rule 26(c)(2) of the Federal Rules of Civil Procedure. Visa U.S.A. will not supply additional responsive information ascertained subsequent to this response if it is merely cumulative or is otherwise not required by Rule 26(e)(2). Further, Visa U.S.A. will limit its interrogatory responses to information that is within the possession, custody or control of Visa U.S.A., and maintained in the ordinary course of business.

INSTRUCTION NO. 2

Please refer to the attached appendix for definitions of many of the terms used in these interrogatories. Any reference to a person that is a business entity includes that person's predecessors (including any pre-existing person that at any time became part of your company after merger or acquisition), successors, parents, divisions, subsidiaries, affiliates, franchisors, franchisees, each other person, directly or indirectly, owned or controlled by it, and each partnership or joint venture to which any of them is a party, including all present and former directors, officers, employees, agents, consultants, attorneys or other persons acting for or on behalf of any of them.

OBJECTION TO INSTRUCTION NO. 2

Visa U.S.A. objects to Instruction No. 2 on the grounds that: (a) it is vague and ambiguous; (b) it is overbroad and unduly burdensome; (c) it exceeds the scope of permissible discovery under Local Civil Rule 26.3(c)(5); and (d) it exceeds the scope of permissible discovery under Federal Rule of Civil Procedure 33.

DEFINITION NO. 1

"Identify," in addition to provisions set forth in Local Rule 26.3, means to state, in the case of a person, the place of employment and title of the person at the time referenced in your response.

OBJECTION TO DEFINITION NO. 1

Visa U.S.A. objects to Definition No. 1 to the extent it seeks to impose discovery obligations beyond those permitted under Local Rule 26.3.

DEFINITION NO. 3

"You," "your," or "your company" means the person to whom these interrogatories are directed and each of its predecessors, successors, parents, divisions, subsidiaries, and affiliates, each other person directly or indirectly, wholly or in part, owned or controlled by it; each partnership or joint venture to which any of them is a party; and all present and former directors, officers, employees, agents, attorneys, consultants or other persons acting for or on behalf of any of them. In addition, when referring to "your" cards, "your" includes any card that is accepted on your network, regardless of who distributes the card.

OBJECTION TO DEFINITION NO. 3

Visa U.S.A. objects to Definition No. 3 on the grounds that it makes each of the interrogatories in which it is used (a) vague and ambiguous; (b) overbroad and unduly burdensome; (c) exceed the scope of permissible discovery under Local Civil Rule 26.3(c)(5); and (d) exceed the scope of permissible discovery under Federal Rule of Civil Procedure 33. Visa U.S.A. will interpret (a) the terms "you," "your," or "your company" to mean Visa U.S.A. and its current directors, officers and employees, and (b) the term "your" cards to mean Visa-brand payment cards.

**SPECIFIC OBJECTIONS AND RESPONSES
TO INTERROGATORIES****INTERROGATORY NO. 1:**

Identify all briefs, draft briefs, memoranda or other documents prepared by Visa U.S.A. and/or its counsel for submission (in final form) to the Court and/or opposing counsel in the *Mountain West* litigation (*i.e.*, the trial court and appellate proceedings leading to the decision of the Court of Appeals in SCFC ILC, Inc. v. Visa USA, 36 F.3d 958 (10th Cir.

1994)) that were sent by you¹ prior to 1995 to any representative(s) of MasterCard, including, for each such document: (i) the Bates number (including prefix or custodial information given the document in this or the *Wal-Mart*) litigation; (ii) the date it was sent by you, and (iii) to whom it was sent. (To the extent you assert such documents are privileged, you should not only provide the information requested but also prepare a privilege log containing the author/source of the document, the recipient of the document, a subject-matter description of the document sufficient to allow the Government to determine the nature of the document, the claim of privilege being asserted, and the date of the document)

RESPONSE TO INTERROGATORY NO. 1:

Visa U.S.A. objects to Interrogatory No. 1 on the grounds that: (a) it is overbroad and unduly burdensome; (b) it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, and (c) it exceeds the scope of discovery permissible under Local Rule 33.3(b), to the extent the information sought can more practically be obtained through other means of discovery. Visa U.S.A. further objects to this interrogatory to the extent it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or other applicable privilege.

Subject to and without waiving the foregoing objections, Visa U.S.A. will respond to this interrogatory by producing at a mutually agreed-upon time and place briefs, memoranda or other documents it prepared for submission to the Court and/or opposing counsel in the *MountainWest* litigation, to the extent it can determine that such documents were sent by Visa U.S.A. or its outside counsel to any representative of MasterCard prior to 1995 (together with whatever distribution information may be available with such transmissions).

¹ As set out in the definitions, the reference to "you" here specifically includes outside counsel representing Visa U.S.A. with respect to such matters.

INTERROGATORY NO. 2:

Did MasterCard have a joint defense agreement with Visa U.S.A. with respect to any claims or causes of action alleged against either or both of them by Discover/Dean Witter/Mountain West prior to 1995? If so, please state the dates the agreement was in effect and the claims or causes of action to which the agreement was applicable.

RESPONSE TO INTERROGATORY NO. 2:

Visa U.S.A. objects to Interrogatory No. 2 on the grounds that: (a) it is overbroad and unduly burdensome, and (b) it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Visa U.S.A. further objects to this interrogatory to the extent it seeks information protected from disclosure by the attorney-client privilege, work product doctrine, joint defense privilege, or other applicable privilege.

Subject to and without waiving the foregoing objections, Visa U.S.A. is not aware of a joint defense agreement between Visa U.S.A. and MasterCard with respect to any claims or causes of action alleged against either or both of them by Discover/Dean Witter/Mountain West prior to 1995.

INTERROGATORY NO. 3:

Identify each agreement between Visa U.S.A. and a member bank entered into between January 1, 1990 and the date of your answer to this interrogatory whereby that member bank agrees that, by a specific future date, a certain percentage of its entire portfolio of cards will be Visa cards (e.g., the 1999 agreements with Bank of America and Bank One).

RESPONSE TO INTERROGATORY NO. 3:

Visa U.S.A. objects to Interrogatory No. 3 on the grounds that: (a) it is unduly vague and ambiguous; and (b) it exceeds the scope of discovery permissible under Local Rule 33.3(b), to the extent the information sought can more practically be obtained through other means of discovery.

Subject to and without waiving the foregoing objections, Visa U.S.A. will respond to this interrogatory by producing copies of all Partnership Agreements executed to date that have not yet been produced, at a mutually agreed-upon time and place.

INTERROGATORY NO. 4:

Identify each merchant that you have reason to believe discontinued accepting Visa cards at any time since January 1998, due, in whole or in part, to an increase in Visa's interchange rates or an increase in the merchant discount paid by that merchant as a result of an increase in such interchange rates.

RESPONSE TO INTERROGATORY NO. 4:

Visa U.S.A. objects to Interrogatory No. 4 on the grounds that: (a) it is overbroad and unduly burdensome; (b) it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; and (c) it exceeds the scope of discovery permissible under Local Rule 33.3(b), to the extent the information sought can more practically be obtained through other means of discovery.

Subject to and without waiving the foregoing objections, Visa U.S.A. is unaware of any merchant in the United States who discontinued accepting Visa cards since January 1998 due, in whole or in part, to an increase in Visa U.S.A.'s interchange rates or an increase in a merchant discount as a result of an increase in interchange. This response is subject to the following qualification: Visa U.S.A. neither establishes the merchant discount nor contracts with merchants for the acceptance of Visa cards. While Visa U.S.A. does not possess sufficient information to respond further, pertinent information may be in the possession of acquiring banks or third-party processors.

DOCUMENT REQUESTS

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Local Rule 26.3, Visa U.S.A. hereby responds to the document requests attached to the Second Set of Interrogatories as follows:

GENERAL OBJECTIONS

1 Visa U.S.A. makes the following general objections to the document requests, which objections are applicable to each request and incorporated therein. Further, a statement by Visa U.S.A. in response to a particular request that it will produce responsive documents is not a representation that any such documents exist, but only that such documents will be produced if they are located after Visa U.S.A. conducts a search of locations where it is reasonably likely that responsive documents would be found.

2 To the extent that any request may be construed as calling for information that is subject to a claim of privilege, including, but not limited to, the attorney-client privilege, the work product doctrine, or any constitutional, statutory or regulatory proscription against disclosure, Visa U.S.A. hereby asserts that doctrine or privilege and objects to the request on that basis. The specific objections set forth below are exclusive of any material so protected. Inadvertent disclosure of any such documents or information shall not constitute a waiver of any privilege or any other ground for objecting to discovery with respect to such documents or information, the subject matter thereof, or other documents or information, and shall not waive the right of Visa U.S.A. to object to the use of any such document or information during this action or in any other proceeding.

3 Visa U.S.A. objects to the requests as overbroad, unduly burdensome and beyond the scope of permissible discovery under Local Rule 26.3(c)(5) and Federal Rule of Civil Procedure 34, to the extent they call for or may be construed as calling for documents in the possession, custody or control of (a) Visa U.S.A.'s member banks, (b) Visa International, (c) any legal entity other than Visa U.S.A. (such as foreign Visa entities or ventures in which Visa U.S.A. is merely a joint venture partner, or participant), (d) any former director, officer, employee, agent, attorney, consultant or other person acting on Visa U.S.A.'s behalf who is no longer so acting, or (e) current outside agents, attorneys, consultants or other persons acting on Visa U.S.A.'s behalf. Subject to any objections or limitations contained herein, Visa U.S.A. will produce information in its own possession or that of its current directors, officers, and employees.

DOCUMENT REQUEST NO. 1:

To the extent not previously produced to plaintiff, the documents received by you that are the subject of Interrogatory 1 above.

RESPONSE TO DOCUMENT REQUEST NO. 1:

Visa U.S.A. objects to Request No. 1 on the grounds that (a) it is unduly vague and ambiguous; (b) it is not reasonably calculated to lead to the discovery of admissible evidence; (c) it is overbroad and unduly burdensome; and (d) it exceeds the scope of permissible discovery under Federal Rule of Civil Procedure 34.

Subject to and without waiving the foregoing objections, and re-interpreting the phrase "received by you" to mean "sent by you," Visa U.S.A. will produce at a mutually agreed-upon time and place briefs, memoranda or other documents it prepared for submission to the Court and/or opposing counsel in the *MountainWest* litigation, to the extent it can determine that such documents were sent by Visa U.S.A. or its outside counsel to any representative of MasterCard prior to 1995 (together with whatever distribution information may be available with such transmissions).

DOCUMENT REQUEST NO. 2:

To the extent not previously produced to plaintiff, the joint defense agreement(s) that are the subject of Interrogatory 2 above.

RESPONSE TO DOCUMENT REQUEST NO. 2:

Visa U.S.A. objects to Request No. 2 on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving the foregoing objections, Visa U.S.A. responds as follows: See Response to Interrogatory No. 2, above.

DOCUMENT REQUEST NO. 3:

To the extent not previously produced to plaintiff, the agreements requested to be identified in Interrogatory 3 above.

RESPONSE TO DOCUMENT REQUEST NO. 3:

Subject to and without waiving the foregoing objections, and subject to the objections and response provided in response to Interrogatory No. 3 above, Visa U.S.A. will produce copies of all Partnership Agreements executed to date that have not yet been produced, at a mutually agreed-upon time and place.

DOCUMENT REQUEST NO. 4:

To the extent not previously produced to plaintiff, all minutes or any pre-read materials for any meeting of the Board of Visa U.S.A., or any subcommittee thereof, since March 1, 1999.

RESPONSE TO DOCUMENT REQUEST NO. 4:

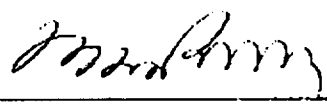
Visa U.S.A. objects to Request No. 4 on the grounds that (a) it is unduly vague and ambiguous; (b) it is overbroad and unduly burdensome; and (c) it exceeds the scope of permissible discovery under Federal Rule of Civil Procedure 34.

Subject to and without waiving the foregoing objections, to the extent Visa U.S.A. has not previously produced minutes or pre-read materials for any meeting of the Board of Visa U.S.A., or any board committee thereof since March 1, 1999, Visa will produce such documents.

DATED: January 7th, 2000

HELLER EHRMAN WHITE & MCAULIFFE

By


M. Laurence Popofsky (LP 8822)

Stephen V. Bomse (SB 6594)

Alex E. Miller (AM 7197)

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Counsel for Defendant

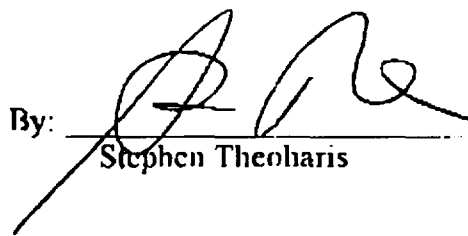
Visa U.S.A. Inc.

HIGHLY CONFIDENTIAL --
SUBJECT TO PROTECTIVE ORDER
OUTSIDE COUNSEL ONLY

VERIFICATION

I, Stephen Theoharis, am Senior Vice President and Assistant General Counsel for defendant Visa, U S A , Inc., and I have been authorized to make this Verification on its behalf. I have read Defendant Visa U.S.A. Inc.'s Objections and Responses to Plaintiff's Second Set of Interrogatories and know the contents thereof. The same is true of my own knowledge or is based on information developed at my direction by persons at Visa U.S.A., Inc. with knowledge of such matters. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, on this 7th day of January, 2000.

By: 
Stephen Theoharis

PROOF OF SERVICE BY FACSIMILE

I, Jan M. Knabe, declare as follows:

I am employed with the law firm of HELLER, EHRMAN, WHITE & McAULIFFE, whose address is 333 Bush Street, San Francisco, California 94104. I am readily familiar with the business practices of this office. At the time of transmission, I was at least eighteen years of age and not a party to this action.

On, January 10, 2000, at approximately 4:30 p.m., by use of facsimile machine, I served a copy of the within document(s):

DEFENDANT VISA U.S.A. INC.'S OBJECTIONS AND RESPONSES TO
PLAINTIFF'S SECOND SET OF INTERROGATORIES

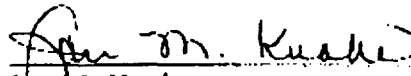
on the following interested parties:

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Melvin Schwarz, Esq.
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Washington, D.C. 20530
Facsimile: 202-307-9952

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 10, 2000.


Jan M. Knabe